United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
MARGERY EVANS REIFLER

75-7389

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PATRICIA McREDMOND, et al., by their attorney and next-friend, CHARLES SCHINTSKY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-against-

MALCOLM WILSON, individually and as Governor of the State of New York, et al.,

Defendants-Appellees.

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR DEFENDANTS-APPELLEES

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Docket No. 75-7389

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BRIEF FOR DEFENDANTS-APPELLEES

Questions Presented

1. Did the special circumstances presented in this case warrant the application of the abstention doctrine to plaintiffs' treatment claims?

2. Are plaintiffs' claims of cruel and unusual punishment and restriction of their freedom to travel and associate single district court issues over which the District Court properly abstained; if not, do they present substantial federal questions which require the convening of a three-judge court?

3. Does plaintiffs' equal protection claim present a substantial federal question which requires the convening of a three-judge court?

Prelimary Statement

Plaintiffs-appellants ("plaintiffs") appeal from an order of the United States Court for the Southern District of New York (Gagliardi, J.), entered on June 27, 1975. The order stayed this action in accordance with the Court's opinion of June 23, 1975, which held that the Court would abstain from exercising jurisdiction over the action, pending plaintiffs' resort to the state courts.

Statement of the Case

A. The Complaint

Plaintiffs commenced this civil rights action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3),(4). Plaintiffs are children who have been adjudicated "persons in need of supervision" ("PINS")* by the New York Family Court and placed by that Court into one of the PINS training schools operated by the New York State Division for Youth ("DFY")**. Named defendants are the Governor, various DFY officials, the training school superintendents, and the Family Court judges who ordered the placements. Plaintiffs challenge and seek to enjoin the New York statutes authorizing their placement in training schools. N.Y. Family Court Act §§ 754, 756 (A. 1, ¶ 1; A. 50-56).

* A PINS is a child under sixteen who is habitual truant or who is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent or other lawful authority. N.Y. Fam. Ct. Act § 712(b) (McKinney's Supp. 1974); Matter of Patricia A., 31 N Y 2d 83 (1972).

**Since the commencement of this action, one of the four training schools, Hudson, was closed.

Plaintiffs contend that they have a state statutory right to "adequate and appropriate training, care, and rehabilitation" under Fam. Ct. Act 255, 711 and 732 and Exec. Law §§ 501, 510 and 511. Plaintiffs also argue that they have a constitutional right to "adequate and appropriate treatment" secured by the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution as well as Article I, section 6 of the New York State Constitution. They contend that their placement in training schools violates these rights. The claims enumerated in the complaint are broken down as follows (A. 50-53, Claims 1-8):

> 1. That the placement of PINS in state training schools denies them equal protection of the law because PINS are treated differently from abused or neglected children who cannot be placed in training schools (¶ 147);
>
> 2. That the placement of PINS in training schools geographically distant from their families, friends and communities violates the Eighth Amendment proscription against cruel and unusual punishment (¶ 141);
>
> 3. That the placement of PINS in training schools where their movement and association is limited to the facility violates their rights to freedom of travel and association (¶ 142);

4. That the placement of PINS in training schools which fail to provide adequate and appropriate treatment violates the Eighth Amendment proscription against cruel and unusual punishment (¶ 145);

5. That the deprivation of liberty suffered by virtue of plaintiffs' status as PINS can be justified only if they receive adequate and appropriate treatment, which the training schools do not and cannot provide (¶ 143);

6. That the deprivation of liberty suffered by PINS who are placed in training schools without their having received the full panoply of rights required in criminal proceedings can be justified only if plaintiffs receive adequate and appropriate treatment, which the training schools do not and cannot provide (¶ 144);

7. That the failure and inability to provide adequate and appropriate training, care, and rehabilitation to plaintiffs violates N.Y. Fam. Ct. Act §§ 255, 711 and 732 and N.Y. Exec. Law §§ 501, 510 and 511 (¶ 148); and

8. That the placement of PINS in training schools when they can receive adequate and appropriate treatment in other settings violates their right to receive the least restrictive treatment alternative (¶ 146).

Plaintiffs seek a judgment declaring the statutes authorizing their placement in state training schools (Fam. Ct. Act §§ 754, 756) unconstitutional and seek to enjoin defendants from placing or continuing to hold them in training schools (A. 54-55, ¶¶ B, D). They seek further to enjoin their transfer by defendants to alternative facilities unless such facilities are proved to be satisfactory; to require defendants

to submit and implement a plan for their transfer to alternative facilities and programs; and to order defendants to develop such programs and facilities if they do not exist (A. 55-56, ¶¶ E, F). Should the federal courts refuse to invalidate their placement in training schools as per se unconstitutional, plaintiffs seek to enforce their alleged statutory and constitutional right to treatment. For example, plaintiffs seek preliminary and permanent injunctions "sufficient to rectify the unconstitutional acts and omissions and statutory violation alleged herein" (A. 55, ¶ C). By a stipulated amendment to their complaint, plaintiffs also demand the convening of a three-judge court.

B. Prior Proceedings

Defendants moved in the District Court to dismiss the complaint, urging the Court to abstain from deciding plaintiffs treatment claims (ante at 4-5, # 4-8)*. As to the other claims (ante at 4, # 1-3) defendants argued that plaintiffs had failed

* The parties agree that plaintiffs' treatment claims do not require the convening of a three-judge court (Plaintiffs-Appellants' Brief at 39-40, n.*). These claims do not challenge the constitutionality of the statutes authorizing placement in training schools but rather attack the unconstitutionality of the result (inadequate treatment) obtained by use of the statutes and seek to enforce the right to treatment. Under these circumstances, a three-judge court is not required. Phillips v. United States, 312 U.S. 246, 251-53 (1941); Ex Parte Bransford, 310 U.S. 354, 361 (1940); Johnson v. Harder, 438 F. 2d 7, 13 (2d Cir. 1971). See also Morales v. Turman, 383 F. Supp. 53, 60-64; 1A Moore's Federal Practice Co., 0.205 at 2238 (2d ed. 1974); Comment, 26 Baylor L. Rev. 367, 373-375 (1974).

to state a claim under 42 U.S.C. § 1983 and failed to present a federal question which would support jurisdiction under 28 U.S.C. §§ 1343(3),(4). In each instance, defendants contended that plaintiffs claims were obviously without merit or foreclosed by prior decisions. See Hagans v. Lavine, 415 U.S. 528, 536-538 (1974).

Plaintiffs moved for a preliminary injunction and a class action determination of plaintiffs and defendant judges, both of which motions were opposed by defendants. The "factual allegations" set forth in plaintiffs' brief in this Court, (Brief at 5-7), were rebutted in particularity by defendants during the course of the proceedings (A. 64-68, 148-195). For example, the claim that plaintiffs were not provided with adequate treatment or individualized programs was rebutted by affidavits from the intake worker and cottage supervisor for each child (A. 153-195). Defendants also moved to stay plaintiffs' request for production of documents.

In its opinion of June 23, 1975 the District Court abstained from exercising its jurisdiction over all of plaintiffs' claims and accordingly did not reach the other motions. Analogizing the instant case to Reid v. Board of Education of the City of New York, 453 F. 2d 238 (2d Cir. 1971), the Court noted that plaintiffs had asserted a statutory right to treatment which had recently been the subject of litigation

in the New York Court of Appeals and was as of yet "undefined and unclear" (A. 218-220). The Court decided to abstain on plaintiffs' treatment claims because the action concerned a sensitive and complex area of state administration (A. 221-224) which was the subject of evolving law in the state courts and because a decision on plaintiffs' statutory claim under an unclear state law "might obviate the necessity of a federal constitutional determination" (A. 220). Noting that a favorable decision on the statutory claims might moot or modify the other federal constitutional issues as well, the Court also abstained on the non-treatment claims (A. 220).

The District Court stated that state court proceedings should be expeditiously commenced and that the Court would retain jurisdiction and entertain a motion to reopen the case in the event of unreasonable delay in the state court proceedings (A. 224).

C. Statutory Scheme for PINS

Section 712(b) of the Family Court Act defines a person in need of supervision as one who is "a habitual truant"* or who is "incorrigible, ungovernable or habitually disobedient

* L. 1970, c. 906 substituted a more specific definition of habitual truant. § 712(b) (McKinney's Supp. 1974).

and beyond the lawful control of parent or other lawful authority". A petition initiating a PINS proceeding must allege that the child fits into one of these categories and is in need of supervision or treatment (§ 732). PINS proceedings are conducted in two steps -- a fact-finding hearing and a dispositional hearing. The fact-finding hearing (§ 742) is conducted to determine whether the child has committed the acts alleged in the petition. A child cannot be adjudicated a PINS for a single act of misbehavior. E.g. Matter of David W., 28 N Y 2d 589 (1971); Matter of David M., 34 A D 2d 1100 (4th Dept. 1970). Rather, a pattern of misbehavior fitting into one of the definitional categories must be proved, and it must be proved beyond a reasonable doubt. Matter of Richard S., 27 N Y 2d 802 (1970).

If the child is found to be a PINS, a dispositional hearing is held to determine whether the child requires supervision or treatment (§ 743).* If a positive determination is

* At the dispositional hearing the Court ordinarily has before it the report prepared by the Probation Department, which includes information on the PINS' home situation, schooling, and prior dispositions; a psychiatrist's report; and the reports of any other social agencies to which the PINS was previously referred or placed.

made, the Court will enter an order adjudicating the child a PINS (§ 752) and an order of disposition will be made. The Court is empowered to discharge with a warning (§ 754[a]); to suspend judgment, with conditions (§§ 754[b], 755); to order probation, with conditions (§§ 754[d], 757); or to order placement (§ 754[c]) in accordance with § 756. Section 756(a) [McKinney Supp. 1974] allows the PINS to be placed with enumerated persons or agencies, including the Division for Youth, pursuant to Article 19-G of the Executive Law.

The New York State Division for Youth is authorized to operate and maintain state training schools for PINS under § 501(6) and Title III of the Executive Law.* If the Family Court determines that a training school is appropriate for a PINS, it will order placement with DFY under Title III.**

A PINS may move for a new fact-finding or dispositional hearing (§ 761). Any order of the Court can be stayed, arrested, set aside, modified, or vacated by the Court (§ 762).

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* The Operation of the state training schools is governed also by 9(A) N.Y.C.R.R. Parts 168, 169, 171. When the complaint was filed the approximate populations of the four schools were Hudson (68), Highland (55), Brookwood (39), and Tryon (141). As of September 12, 1975, after Hudson was closed, the figures were Highland (105), Brookwood (40), and Tryon (124).

**As plaintiffs own allegationsillustrate, many PINS placed in training schools are so placed only after a history of unsuccessful placements in other types of facilities and programs (A. 25-26, ¶ 66; A. 27-28, ¶¶ 72-73; A. 29-30, ¶ 79; A. 33-34, ¶ 93; A. 34-35, ¶ 95; A. 37-38 ¶ 103; A. 42-43, ¶¶ 116-117; A. 48, ¶¶ 134-135).

A parent, guardian, duly authorized agency or next friend of a PINS placed pursuant to § 756 may petition to the Court for an order terminating his placement (§ 764) and a hearing may be held (§ 766). The Court is empowered to terminate or modify a PINS placement in a variety of ways and may act on its own motion (§ 767). Appeals from orders of the Family Court are taken to the Appellate Division, in accordance with Article II of the Family Court Act (McKinney's Supp. 1974).

Statutes

N.Y. FAmily Court Act:

> § 255. Cooperation of officials and organizations (McKinney's Supp. 1974)
>
> It is hereby made the duty of, and the family court or a judge thereof may order, any state, county and municipal officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act. It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act. The court is authorized to seek the cooperation of, and may use, within its authorized appropriation therefor, the services of all societies or organizations, public or private, having for their object

the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.

§ 743. Definition of "dispositional hearing"

When used in this article, "dispositional hearing" means in the case of a petition to determine delinquency, a hearing to determine whether the respondent requires supervision, treatment or confinement. In the case of a petition to determine need for supervision, "dispositional hearing" means a hearing to determine whether the respondent requires supervision or treatment.

§ 754. Disposition on adjudication of person in need of supervision

Upon an adjudication of person in need of supervision, the court shall enter an order of disposition:

(a) Discharging the respondent with warning;
(b) Suspending judgment in accord with section seven hundred fifty-five;
(c) Continuing the proceeding and placing the respondent in accord with section seven hundred fifty-six; or
(d) Putting the respondent on probation in accord with section seven hundred fifty-seven.

§ 756. Placement (McKinney's Supp. 1974)

(a) [See, also, subd. (a) below] For purposes of sections seven hundred fifty-three and seven hundred fifty-four, the court may place the child in its own home or in the custody of a suitable relative or other suitable private person or a commissioner of social services or an authorized agency including the division for youth pursuant to article nineteen-G of the executive law subject to the orders of the court.

(a) [See, also, subd. (a) above] For purposes of section seven hundred fifty-three and seven hundred fifty-four, the court may place the child in its own home or in the custody of a suitable relative or other suitable private person or an authorized agency, or a facility of the division for youth as provided in section five hundred two of the executive law, including subdivisions four thereof, subject to the orders of the court.

(b) Placements under this section may be for an initial period of eighteen months and the court in its discretion may, at the expiration of such period, make successive extensions for additional periods of one year each. The place in which or the person which the child has been placed under this section shall submit a report at the end of the year of placement, making recommendations and giving such supporting data as is appropriate. The court on its own motion may at the conlusion of any period of placement hold a hearing concerning the need for continuing the placement.

(c) Successive extensions may be granted, but no placement may be made or continued under this section beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday.

POINT I

IN LIGHT OF THE SPECIAL CIRCUMSTANCES PRESENTLY BY THIS CASE, THE DISTRICT COURT PROPERLY ABSTAINED FROM EXERCISING JURISDICTION OVER PLAINTIFFS' TREATMENT CLAIMS.

A.

In the instant case, this Court is presented with plaintiffs who assert a state statutory right to treatment as well as a constitutional right under the New York and United States Constitutions. New York case law has evolved to a point where the New York courts have indicated a willingness to fully define that right. As of yet, that right, which concerns a particularly sensitive area of state regulation, is unclear and undefined. A decision on plaintiffs' statutory claim may eliminate or substantially modify plaintiffs' federal constitutional claims. In sum, this action presents a paradigm situation for the application of the abstention doctrine.

The abstention doctrine is employed to avoid unnecessary federal interference in state concerns as well as needless and premature decisions under the federal Constitution. Harris County Commissioners Court v. Moore, _____ U.S. _____, 43 L. Ed. 2d 32 (1975); Harman v. Forssenius, 380 U.S. 528 (1965);

Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). When an unclear state statute can be construed by the state courts so as to avoid or modify the constitutional question presented, abstention is appropriate. Lake Carriers Assn. v. MacMullen, 406 U.S. 498 (1972); Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, supra; Meridan v. Southern Bell T & T Co., 358 U.S. 639 (1959). Application of the doctrine is proper when resolution of the federal is dependent upon or may be materially altered by the determination of the uncertain state law issue. Harman v. Forssenius, 380 U.S. at 534. See Askew v. Hargrave, 401 U.S. 476, 478 (1971). See generally, Field, Abstention in Constitutional Cases, 122 U. Pa. L. Rev. 1071-1147 (1974); Note, Judicial Abstention from the Exercise of Federal Jurisdiction, 59 Col. L. Rev. 749 (1959).

Plaintiffs in this case assert a statutory right to treatment (A. 53, ¶ 148), and the New York Court of Appeals has unequivocally held that such a right exists. Matter of Lavette M., 35 N Y 2d 136, 141-143 (1974); Matter of Ellery C., 32 N Y 2d 588, 591 (1973)*. The exact meaning and scope of the

* This is not a case in which the state law issues are peripheral to a primary federal claim. E.g. Mayor v. Educational Equality League, 415 U.S. 605, 628-29 (1974).

state statutes has yet to be defined by the New York courts. When the state courts do determine the nature of the State's statutory obligation to PINS, the determination may afford plaintiffs susbtantially the same and possibly more relief than they could obtain on federal constitutional basis. This is especially so because plaintiffs have a right only to a constitutional minimum under the United States Constitution while the New York courts may find that their statutory or state constitutional right creates higher standards and protections. Compare, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973) with People ex rel. Donohoe v. Montanye, 35 N Y 2d 221, 225-226 (1974). See People v. Blake, 35 N Y 2d 331, 335-336 (1974).

Any decision by the New York courts will modify, and perhaps eliminate, the federal constitutional question. If the New York Courts determine that appropriate treatment cannot be provided in its training schools, the litigation will be completed. If the state courts hold that elements "a", "b", and "c" constitute adequate treatment, then plaintiffs need not proceed to the federal courts unless they assert that their federal right includes an additional element ("x"). Even in that situation, while the federal courts would have to examine the asserted federal right for element "x", a premature constitutional decision on elements "a", "b" and "c" will have been avoided. Accordingly, plaintiffs' continued insistence that

their state claim is the same as their federal claim and that the District Court impermissibly required them to exhaust their state remedies is specious. The nature of their state right to treatment is unclear, and it is precisely this uncertainty which makes abstention proper.

In any event, it is manifest that a state court decisio[illegible] at least substantially modify, if not obviate, the need for a decision on the constitutional claim. As the Supreme Court stated in Meridan v. Southern Bell T & T Co., supra, 358 U.S. at 640-41:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. That is especially desirable where the questions of state law are enmeshed with federal questions. Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty -- certainly for a federal court. In such a case, when the state court's interpretation of the statute or evaluation of its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." (citations omitted).

See Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105-106 (1944).

In Reid v. Board of Education of the City of New York, 453 F. 2d 238 (2d Cir. 1971), brain-injured and other handicapped children sought declaratory and injunctive relief against school officials who allegedly had failed to provide special classes for all eligible children as well as prompt screening. Although plaintiffs there did not assert pendent state claims, this Court found that they had a substantial statutory and constitutional claim under New York law (id. at 240) as do the plaintiffs at bar. The Reid plaintiffs' claims were not grounded upon state constitutional rights which were merely counterparts for their asserted federal rights but upon specific state statutes (id. at 244), like the claims of plaintiffs herein.*

Finally this Court in Reid was presented with unclear state law in a "particularly sensitive and complex area of state regulation" in which the state courts had expressed a willingness to review complaints. Id. at 243. Accordingly, this Court affirmed

* Plaintiffs herein assert a state statutory right to "adequate and appropriate training, care and rehabilitation" under Fam. Ct. Act §§ 501, 510, 511 and Exec. Law §§ 255, 711, 732 (A. 53, ¶ 148). The New York Court of Appeals found the right to treatment pursuant to Fam. Ct. Act. § 743, Matter of Ellery C., supra, 32 N Y 2d at 591.

the lower court's decision to abstain, "since a decision under state law might obviate the necessity of a federal constitutional determination" and federal adjudication "would thrust the federal courts into a sensitive area of state administration." Id. at 240. Accord, McMillan v. Board of Education of the City of New York, 331 F. Supp. 302, 308-310 (S.D.N.Y. 1971) (three-judge court). See also Freda v. Lavine, 494 F. 2d 107 (2d Cir. 1974); Phagen v. Mill[illegible], 312 F. Supp. 323 (S.D.N.Y. 1970) (three-judge court).

Not only does the instant case raise state law claims which will eliminate or modify the federal claims, but also it presents other important factors supporting the application of the abstention doctrine. Like the area of education for the handicapped, the issue of the treatment owed to PINS is a particularly sensitive and complex area of state law. Reid, 453 F. 2d at 240, 243. See also Railroad Comm'n v. Pullman Co., supra, 312 U.S. at 498; Magaziner v. Montemuro, 468 F. 2d 782, 787-88 (3d Cir. 1972). Plaintiffs themselves rely on numerous sections of the Family Court Act and Executive Law for their asserted statutory right (A. 55 ¶ 148). The placement of a PINS into a training school is but the culmination of complicated statutory scheme for PINS (ante at 8-11). PINS are not ordinarily placed in training schools except after

lengthy testing, evaluation, and the exploration of alternative placement. Those PINS ordered to training schools can and have successfully challenged the suitability of their placement there rather than in less secure or private facilities. E.g. Matter of Shirley G., 45 A D 2d 876 (2d Dept. 1974); Matter of Daniel B., 43 A D 2d 861 (2d Dept. 1974); Matter of Jeanette M. 40 A D 977 (2d Dept. 1972); Matter of Stanley M., 39 A D 2d 746 (2d Dept. 1972).

Moreover, the New York courts have demonstrated a particular concern for PINS' right to treatment, as a group as well as individually. E.g. Matter of Lavette M., supra, 35 N Y 2d 136; Matter of Ellery C., supra, 32 N Y 2d 588; Matter of Kevin M., 45 A D 2d 849 (2d Dept. 1974); Matter of Richard C., 43 A D 2d 862 (2d Dept. 1974); Matter of Jeanette M., supra; Matter of Stanley M., supra. The Family Courts have freely used their power under Fam. Ct. Act § 255 to compel the cooperation of agencies and officials so as to effectuate appropriate treatment for children. See cases and discussion, post at 28-31.

An examination of recent New York Court of Appeals decisions indicates that New York law on PINS right to treatment is in the midst of evolution. Although the Courts has held that a right to treatment exists under state law, the content of that right is yet uncertain. However, the Court has expressly indicated its willingness to hear a properly raised treatment claim.

In Matter of Ellery C., supra, the New York Court of Appeals held that PINS had a statutory right to treatment under Fam. Ct. Act § 743 and that their right to "adequate supervision and treatment" in proper facilities was not satisfied by their placement in training schools with juvenile delinquents. 32 N Y 2d at 591. Additionally, the Court rejected the argument that placement in a mixed training school could be justified because it was the only available facility. Id. at 591-592.

After the decision in Ellery C., training schools for PINS and JDs were segregated. Two PINS then challenged that policy, arguing that Ellery C. barred the placement of PINS in any training school. On appeal, the Court of Appeals reaffirmed PINS' right to treatment and held that Ellery C. only barred placement in a training school mixing PINS and JDs. Matter of Lavette M., supra, 35 N Y 2d at 141.

The two PINS in Lavette M. also claimed that PINS training schools failed to provide required treatment. The PINS, however, were appealing from Family Court dispositional orders placing them in training schools. They were not, like the instant plaintiffs, already placed PINS making specific factual allegations, as to their own situations. They made only general allegations, unsupported by any factual allegations as to themselves; there was never any trial or other evidentiary

presentation on the issue of treatment.*

Despite the posture of the case, the Court of Appeals defined the perimeters of the right to treatment as a bona fide offer to adequate treat PINS in light of present knowledge, with individualized treatment plans. 35 N Y 2d at 142-144. Manifestly, the meaning of the statutory right to treatment in New York is still uncertain. The Court's statements calling for "bona fide", "necessary and proper", and "adequate" treatment obviously leave for a future decision the construction of the right. Indeed, the Court stated "Beyond this, we need not go at this time." Id. at 143.

Finally, the Court expressly declared its willingness to hear a properly raised claim (id. at 141):

> ". . . absent a clear showing that the treatment provided at a training school is significantly inadequate to the task, the current experimentation with training school placement for PINS children, as authorized by statute (Family Ct. Act, § 756), should be permitted. On the total record before us, we cannot assume that the necessary initiatives to establish a fully adequate program of supervision and treatment for PINS children, already begun, will not

* The Appellate Division and Court of Appeals' briefs in Lavette M. are available to this Court on request.

> be carried to fruition. A different question will be presented if at a later time it appears that it has not." (emphasis added) (citations omitted).

The decision in Lavette M. is an explicit invitation to PINS to repair to the state courts if they seek to challenge the adequacy of their treatment in training schools.

Abstention in this case is not improper, as plaintiffs suggest (Brief at 25-28), merely because other federal courts dealing with the juvenile treatment issue have not abstained. It does not even appear that the abstention issue was raised in two of the major cases. Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973), affd. 491 F. 2d 352 (7th Cir.), cert. den. 417 U.S. 976 (1974); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), notice of appeal filed September 9, 1974.

Two other cases presented extraordinary, perhaps emergency conditions, which would not countenance delay. Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), enforced, 359 F. Supp. 478 (1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1358 (D.R.I. 1972); Lollis v. New York State Department of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970). Plaintiffs herein do not allege comparable conditions. Post at 24-26 .

Most telling, of course, is the fact that not one of these cases presented the federal courts with all of the factors set forth herein which create the narrowly limited special circumstance in which abstention is appropriate.

B.

This case does not present to this Court extraordinary circumstances which would preclude abstention. In Inmates of Attica Correctional Facility v. Rockefeller, 453 F. 2d 12 (2d Cir. 1971), prisoners presented specific claims of continuing cruel and inhuman abuse. In declining to abstain from deciding their claims, this Court noted that the case was "extraordinary and exceptional". Id. at 20. Nor is this a case in which there exists "a real probability of serious physical harm" which requires federal intervention "essential for physical safety" and "protection from gross deterioration". New York Ass'n. for Retarded Children v. Rockefeller ("Willowbrook"), 357 F. Supp. 752, 767-768 (E.D.N.Y. 1973). See also Dempsey v. McQueenery, 387 F. Supp. 333, 339 (D.R.I. 1975) (injury so "serious, urgent, and dramatic" so as to require speedy resolution in the federal court).

In the instant case the plaintiffs have made no allegations similar to those made in the Attica and Willowbrook cases. They allege no danger of immediate harm or barbarous conditions. Compare, e.g., Morales v. Turman, supra, 383 F. Supp. 53; Inmates of Boys Training School v. Affleck, supra, 346 F. Supp. 1354. Indeed their claim that they received no or inadequate treatment was explicitly rebutted by affidavits setting forth their educational, recreational, an therapeutic programs (A. 153-195). These replies were not rebutted by the affidavits of plaintiffs' four "experts", Drs. Kinzel, Tolchin, Rothman and Sylvia Honig, a DFY employee. Two doctors (A. 135-141) averred generally that institutions do "more harm than good" but did not indicate that they had ever evaluated New York's training schools or any of the plaintiffs.

Dr. Rothman (A. 106-109) averred that two of the named plaintiffs who she had examined in conjunction with the motion for a preliminary injunction were being harmed by their placement in training schools and were not improving. Since Dr. Rothman did not state that she had interviewed the children's treatment teams or that she knew anything of their previous histories, her conclusions are of limited usefulness. Ms. Honig, whose bias as a dissatisfied DFY employee was demonstrated (A. 150, 196-200),

testified to her general observations of one of the four schools but made no factual allegations about the named plaintiffs. While the named plaintiffs themselves submitted affidavits regarding their own feelings that they were being damaged (A. 87-105), the personal opinions of children under sixteen, who obviously wish to leave the schools, are not entitled to weight. In any event, their conclusions were negated by the affidavits of the employees of their schools (A. 153-195).

The fact that plaintiffs are confined does not preclude abstention. Other courts have applied the doctrine even though the plaintiffs sought release from confinement. E.g. Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972) (three-judge court), affd. sub. nom. Briggs v. Arafeh, 411 U.S. 911 (1973); Phagen v. Miller, supra, 312 F. Supp. 323. Moreover, although plaintiffs complain that it is their placement in training schools which deprives them of their "liberty" (Brief at 35-36), it is actually their adjudication as PINS which deprived them of "liberty". They would suffer a loss of liberty even if placed in the alternative programs and homes which they seek to have the federal courts mandate (A. 59-60, ¶ G).

Plaintiffs also complain that abstention will give rise to additional expense and delay. However, this is always the case when a federal court abstains. Peetz v. Bozanich, supra, 397 U.S. at 86. As Judge Weinfeld stated in Phagen v. Miller, supra, 312 F. Supp. at 327 n. 17, "[n]or does any necessary delay occasioned by abstention justify premature adjudication of plaintiffs' claims on the merits". Although plaintiffs suggest a hardship to themselves and their attorneys because venue in the New York Supreme Court would lay upstate, they are of course free to move for a change of venue under N.Y.C.P.L.R. § 187(3).

C.

This Court has stated that a "plain, adequate and complete" remedy in the state courts is a necessary pre-condition to abstention. E.g. Holmes v. New York City Housing Authority, 398 F. 2d 262, 267 n. 7 (2d Cir. 1968); Wright v. McMann, 387 F. 2d 519, 523 n. 6 (2d Cir. 1967). When there is no question that a state has provided a remedy by which the claim may be presented, abstention is appropriate. E.g. Kiernan v. Lindsay, 334 F. Supp. 588, 597 (S.D.N.Y. 1971) (three-judge court), affd. 405 U.S. 1000, reh. den. 405 U.S. 1076 (1973); Phagen v. Miller, supra, 312 F. Supp. at 327 n. 17.

There is no doubt that plaintiffs herein have a state remedy for the relief which they seek. Indeed, it is impossible to imagine that the New York Court of Appeals would have declared a right to treatment for PINS and left open its construction if there were no remedy to enforce that right.

Section 255 of the Family Court Act (McKinney's Supp. 1974) provides:

> "§ 255. Cooperation of officials and organizations.
>
> It is hereby made the duty of, and the family court or a judge thereof may order, any state, county and municipal officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act. It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act. The court is authorized to seek the cooperation of, and may use, within its authorized appropriation therefor, the services of all societies or organizations, public or private, having for their object the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare."

The 1972 amendment to this statute (L. 1972, ch. 1016, §3) specifically empowered the Family Court to order the assistance and cooperation of state, county and municipal officers and employees and other agencies and institutions as is necessary to effectuate the Act. See generally Usen v. Sipprell, 41 A D 2d 251, 259 (4th Dept. 1973); Matter of Carlos P., 78 Misc 2d 851, 854-57 (Fam. Ct. Kings Co. 1974); Matter of Edward M., 76 Misc 2d 781, 783-787 (Fam. Ct. St. Lawrence County 1974), affd., 45 A D 2d 906 (3d Dept. 1974); Matter of Samantha M., 80 Misc 2d 917, 920 (Fam. Ct. Schenectady Co. 1974). The amendment was specially designed so that the Family Court could compel the cooperation of supporting agencies (Matter of Edward M., 76 Misc 2d at 783-785), and the Appellate Division has stated that the Family Court may "solicit and order such care, education, and treatment . . . as it may appear can be appropriate afforded to [the children]." Usen v. Sipprell, 41 A D 2d at 259. Plaintiffs themselves rely on this section in asserting a statutory right to treatment (A. 53, ¶ 148).

Under the powers of this section, the Family Court has ordered that a county commissioner of social services effectuate "different standards and new procedures" for a "viable foster care program" (Matter of Edward M., 76 Misc 2d at 781); that

the Department of Mental Hygiene and one of its divisions "find or create" a suitable facility for a mildly retarded juvenile delinquent (Matter of Leonold Z., 78 Misc 2d 866 [Fam. Ct. Kings Co. 1974]); that the Department "provide or contract" for a proper facility for the care and treatment of a mentally ill child charged with delinquency. Matter of David M., 77 Misc 2d 491 (Fam. Ct. N.Y. Co. 1974). See also Matter of Samantha M., supra, 80 Misc 2d 217; Matter of Graham S., 78 Misc 2d 351 (Fam. Ct. Kings Co. 1974); Matter of Carlos P., supra, 78 Misc 2d 851; Matter of John M., 75 Misc 2d 672 (Fam. Ct. Kings Co. 1973).*

* Thus, while plaintiffs cite two Family Court decisions which refused to consider claims of adequate treatment (Brief at 35), the weight of authority cited above clearly indicates that the Family Court may consider such claims and order relief under § 255. In one of the two cases cited by plaintiffs (Matter of Gaylor Alexander, [Fam. Ct. Richmond Co., May 12, 1975] [attached to plaintiffs' brief]), the Court would not consider a claim of inadequate treatment at a PINS training school on a motion to vacate a dispositional order, but stated that "other remedies may exist". Plaintiffs do not indicate if the case was appealed. Nor do they indicate if the PINS in either case raised the issue of the Family Court's power under § 255.

Moreover, while the Family Court may not be able to issue declaratory judgment (Plaintiffs' Brief at 34), the Court's power to grant relief under § 255 is broad enough to effectuate relief. For example, in Edward M., supra, 76 Misc 2d 781, which was affirmed by the Appellate Division (45 A D 2d 906), a Family Court directed a local social services commissioner to develop a plan to establish "different standards and new procedures" for a viable foster care program (76 Misc 2d at 790), even though the plaintiffs' claim was moot. Other courts required public officials to find or create suitable facilities to care for and treat children. E.g. Matter of Leopold Z., supra, 78 Misc 2d 866; Matter of Graham S., supra, 78 Misc 2d 351.

If in fact plaintiffs should proceed in the New York Supreme Courty, they have an available remedy for a declaratory judgment under C.P.L.R. § 3001. And, as they did in the federal court, they may seek a class action. L. 1975, ch. 207. Plaintiffs' confusion regarding the appropriate avenue of relief does not mean they are without a remedy, especially in light of the Court of Appeals decision in Lavette M. and does not preclude abstention. Even if plaintiffs proceed erroneously, they may expect prompt and careful concern. In Usen v. Sinprell, supra, 41 A D 2d 251, two mentally

handicapped children, one of whom was a PINS, sought relief by way of an Article 78 proceeding in the Supreme Court. The Appellate Division expressed particular concern for their needs (id. at 258). The Court transferred the proceeding to the Family Court for a hearing and an appropriate relief under Family Court Act § 255, stating:

> "Action herein is urgent, and so Family Court should give this proceeding a preference and set it down for the hearing at the earliest possible date on which counsel can be ready." Id. at 259.

POINT II

PLAINTIFFS' CLAIMS OF CRUEL AND UNUSUAL PUNISHMENT AND RESTRICTION OF THEIR FREEDOM OF TRAVEL AND ASSOCIATION DO NOT CHALLENGE THE CONSTITUTIONALITY OF THE STATUTES WHICH PLAINTIFFS SEEK TO ENJOIN. THESE ISSUES WERE PROPERLY BEFORE THE SINGLE DISTRICT JUDGE AND THE COURT PROPERLY ABSTAINED FROM DECIDING THEM. ASSUMING ARGUENDO THAT THESE CLAIMS CHALLENGED THE CONSTITUTIONALITY OF THE STATUTES AT ISSUE, THEY DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS WHICH REQUIRE THE CONVENING OF A THREE-JUDGE COURT.

A.

Plaintiffs herein challenge and seek to enjoin the Family Court Act sections authorizing the placement of PINS in training schools (SS 754, 756). Plaintiffs claim that their placement in state training schools "geographically distant" from their "families, friends and communities" constitutes cruel and unusual punishment "per se" in violation of their rights (A. 50, par. 141). They also claim that their placement in training schools where their movement is restricted to the facility and their association to those at the facility violates their rights to freedom of travel and association

(A. 50, ¶ 42).*

Plaintiffs erroneously argue that these are per se challenges to the constitutionality of the statutes authorizing their placement in training schools. Since they sought to enjoin the use of these statutes, plaintiffs contend that these are claims for a three-judge court only and that a single district judge was without power to abstain from hearing them. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

It is well established that a challenge to unconstitutional results obtained by use of a statute, rather than an attack upon the constitutionality of the statute, does not require the convening of a three-judge court. Phillips v. United States, supra, 312 U.S. at 251-253; Ex Parte Bransford, supra, 310 U.S. at 361; Johnson v. Hardon, supra, 438 F. 2d at 13; Astro Cinema Corp. Inc. v. Mackell, 422 F. 2d 293, 297 (2d Cir. 1970); Starr v. Parks, 345 F. Supp. 795, 798-799 (D. Md. 1972).

* Plaintiffs are not confined in movement to the school nor do they associate only with those at the facility. Defendants submitted material to the District Court showing that the plaintiffs are allowed home visits as well as visits by their family and friends (A. 65-68, ¶ 4-12); for each of the named plaintiffs at issue on the motion for a preliminary injunction, Defendants submitted evidence of their visits and off-campus trips and associations (A. 163, ¶ 19; A. 174, ¶ 8; A. 177-179, ¶¶ 20-22; A. 184-185, ¶¶ 9-11; A. 192-193, ¶¶ 8-9; A. 195, ¶ 15). Although plaintiffs replied that visits and off-campus trips were restrictive (A. 70-75), they did not rebut the factual accuracy of defendants' assertions.

In asserting these two claims, plaintiffs do not challenge the statutes authorizing the Family Court to place PINS in training schools (Fam. Ct. Act §§ 754, 756). Rather, they are challenging the actions of administrative officials of the Division for Youth. Thus, the statute allowing placement could not be attacked if DFY had established twenty training schools throughout the State so that all PINS would be close to home. Similarly, if DFY chose to provide far greater visitation and associational rights, then statute would remain valid. The location of the training schools and their rules on visits are not mandated by the statute allowing placement there by the Family Court but are allegedly unconstitutional results flowing from the actions of administrative officials who establish, operate, and maintain the facilities. In this situation it is not the constitutionality of placement which is challenged (see Vann v. Scott, 467 F. 2d 1235, 1341 [7th Cir. 1972]), and the convening of a three-judge court is not required.

B.

Since these two claims do not attack the constitutionality of the statutes sought to be enjoined, a single district judge was empowered to abstain from deciding them. The District Court found that a state court decision on plaintiffs' treatment claims might also dispose of or modify these two claims (A. 220). Under the abstention cases previously discussed (ante at 14-15), this decision was clearly mandated.

For example, plaintiffs assert that a prerequisite to treatment is a familiar environment and apparently, consistent contact with the PINS' family (A. 19-20, ¶ 49). Accordingly, a favorable state court decision which mandates placement near the PINS' home or provides for consistent contact might well obviate plaintiffs' Eighth Amendment claim (A. 220). Similarly, if plaintiffs raise as part of their statutory right to treatment the need for greater rights of freedom of movement and association and succeed, their First Amendment claim may also be eliminated. Both of these subject areas are intertwined with plaintiffs' other statutory treatment claims. When a state court trial on the statutory right to treatment is likely to encompass these issues, it would be a tremendous and unnecessary imposition on the federal courts to litigate these matters at the same time.

C.

Assuming arguendo that these two claims do challenge the constitutionality of Fam. Ct. Act §§ 754, 756, they do not present a substantial federal question and are properly dismissable. Under the standards most recently summarized in Hagans v. Lavine, 415 U.S. 528, 536-538 (1974), a substantial federal question is not presented if the claim is "obviously frivolous" (Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [1910]) or "plainly unsubstantial" (Levering and Garriques Co. v. Morrin, 289 U.S. 103, 105 [1933]) because it is "manifestly devoid of merit". Hannis Distilling Co., supra at 288. Under this standard, both of plaintiffs' claims were properly dismissible by the single district judge as insubstantial. Ex Parte Poresky, 290 U.S. 30, 32 (1933).

I. The Eighth Amendment Claim

To state a claim under the Eighth Amendment's prohibition against cruel and unusual punishment, the complaint must allege conduct which "shocks the conscience" (Rochin v. California, 342 U.S. 165, 172 [1952]) or amounts to a "barbarous act" (Robinson v. California, 370 U.S. 660, 676 [1962] [Douglas, J. concurring]); LaReau v. MacDougall, 473 F. 2d 974, 977-978 (2d Cir. 1972), cert. den. 414 U.S. 878 (1973).

The conduct must not violate civilized standards of human decency, Trop v. Dulles, 356 U.S. 86, 100-101 (1958), nor be disproportionate to the offense. Weems v. United States, 217 U.S. 349 (1910). See generally Furman v. Georgia, 408 U.S. 238 (1972).*

Applying these standards, the federal courts have sustained claims by confined persons who alleged conduct which was truly barbarous and inhumane. E.g. Wheeler v. Glass, 473 F. 2d 983 (7th Cir. 1973); LaBeau v. McDougall, supra; Wright v. McMann, 460 F. 2d 126 (2d Cir.), cert. den. 409 U.S. 885 (1972); Morales v. Turman, supra, 383 F. Supp. 53; Willowbrook, supra, 357 F. Supp. 752; Inmates of Boys' Training School v. Affleck, supra, 346 F. Supp. 1354. In each of these cases the conditions or acts alleged by the confined persons offended common notions of human dignity.

* In his concurring opinion in Furman, Justice Brennan stated that there are four principles by which we can determine is punishment is cruel and unusual. It must be (1) so severe as to be degrading to human dignity (2) inflicted in a wholly arbitrary fashion (3) clearly and totally rejected throughout society or (4) patently unnecessary. 404 U.S. at 373-74.

For example, in Morales v. Turman, supra, the Court reviewed conditions at two juvenile training schools and found them so shocking that it described them as comparing "unfavorably with one of the most notorious prisons in America." Confinement in the two schools was therefore held to be per se cruel and unusual punishment. 383 F. Supp. at 121-22. In Inmates of Boys' Training Schools, supra, the conditions of confinement for juveniles were described by the Court as "insidiously destructive of the humanity of these boys". 346 F. Supp. at 1365. The inmate in Wright v. McMann, supra, was confined for thirty-three days, sometimes naked, in a bare cell, with insufficient heat. The inmate's eyeglasses were taken from him, he was given no bedding, and hygenic conditions were minimal. 460 F. 2d at 129. See also LaBeau v. McDougall, supra, 473 F. 2d at 977-978. Plaintiffs in the instant case hardly allege any conditions comparable to those in the above cases.

Indeed, when the facts of any of these Eighth Amendment cases are contrasted with plaintiffs' claim that they are geographically distant from their homes, their claim is rendered hopelessly frivolous and indeed foreclosed by prior decisions setting forth the criteria for successful Eighth Amendment claims. While plaintiffs may prefer to be closer

to home, and while it might even be more therapeutic for some of them to be closer to home, their geographic isolation simply does not "shock the conscience" or constitute a "barbarous act". The Eighth Amendment prohibition against cruel and unusual punishment is not intended to obtain for every confined person the conditions which he prefers but only to assure that he is treated in accordance with standards of human decency. Martarella v. Kelley, supra, 359 F. Supp. at 481.

Plaintiffs' suggestion that any restriction on their liberty which is not essential for treatment must be defined as punitive and therefore cruel and unusual punishment. Whether the removal of some PINS from their homes and communities is essential for treatment is, of course, an issue for trial*, and as such, the District Court's decision that this claim may be resolved at a state court trial on treatment is further supported. Plaintiffs choose to ignore the fact that for some PINS a highly structured environment intentionally distant from their previous setting, including family and friends, may be exactly the treatment necessary for them. Cf. Matter of Susan B., 45 A D 2d 920 (4th Dept. 1974); Matter of Mario, 65 Misc 2d 708, 711 (Fam. Ct. N.Y. Co. 1971).

* One of the cases cited by plaintiffs holds that the condition must be such that it can "only be considered punitive", deriving from punishment rationales like retribution or detonence. Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971).

Furthermore, plaintiffs' reliance on the cases which have held that pretrial detainees may not be restricted any more than is necessary to assure their future appearance and jail security is misplaced (Brief at 42-43). PINS placed at training schools are not presumably innocent people who failed to make bail. They are children who have been adjudicated PINS because it has been found beyond a reasonable doubt that they have committed a pattern of behavior which fits into one of the definitional sections of Fam. Ct. Act § 712(b). Matter of Richard S., supra, 27 N Y 2d 802; Matter of David W., supra, 28 N Y 2d 589. While undoubtedly entitled to different custody and treatment than prisoners, they do not retain the liberty rights of unconvicted persons confined because of financial problems.

II. First Amendment Claim

Plaintiffs also contend that their freedom of travel and ability to associate is unduly restricted by their placement in training schools. Plaintiffs err in their basic assumption because it is not their placement in a training school which restricts these freedoms but their adjudication as PINS.

When a state exercises legitimate control over a person within its jurisdiction, e.g. by penal law, civil commitment, a PINS adjudication, compulsory education laws, or curfews, the fact that the individual's freedom of movement and association is restricted is not a violation of his constitutional rights. When a person is within the state's custody (e.g. a PINS, criminal, or mental defective), he no longer retains the same rights as an individual who has not been subjected to the state's process.

This proposition has been made amply clear in the penal area. It is a familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system". Wolff v. McDonnell, 418 U.S. 539, 555 (1974); Price v. Johnson, 334 U.S. 266, 285 (1948).

Thus, while an inmate is not wholly stripped of constitutional protections, his rights may be diminished by the legitimate objectives of a corrections system, as well as the needs and exigencies of the institition environment. Wolff v. McDonnell, 418 U.S. at 555; Pell v. Procunier, 417 U.S. 817 (1974); Procunierv. Martinez, 416 U.S. 396, 412-13 (1974).

By analogy, it is clear that PINS do not have the right to travel and associate which is enjoyed by ordinary citizens.* See Morales v. Turman, supra, 383 F. Supp. at 68; Negron v. Wallace, 436 F. 2d 1139 (2d Cir.), cert. den., 402 U.S. 998 (1971) (restriction of juveniles's access to counsel). All placement orders for PINS, whether for training schools or other facilities, involve such restrictions. Indeed, so would the alternative placements which plaintiffs seek (P. 55-56, ¶ F). Both the legitimate objectives of a juvenile training school program, as well as the needs and exigencies of an institutional environment, justify restrictions on PINS' freedom of movement and association.

* Cf. Matter of Mario, supra, 65 Misc 2d 708, in which Judge Dembitz discussed state compulsory educations laws and the state's right to confine a habitual truant (PINS). Noting that it is true that the State does not exercise comparable control over adults, the Court said:

> ". . . despite the new equation of children with adults with respect to some rights, the eternal verity of the child's biological and psychological differences -- his immaturity and plasticity -- continues to evoke many different legal restrictions as well as privileges for the child." Id. at 717.

Viewed in this light, plaintiffs' arguments are wholly insubstantial. It is not within the federal court's province to decide how many visitors a PINS should have, when a home furlough is appropriate, or which children shall be permitted off-campus trips to the local community. This is not a case in which plaintiffs allege the total lack of any freedom of movement or association. Defendants' unrebutted affidavits clearly indicated the reasonableness of their practices in the area (see ante at 34, n. *). The Supreme Court's decisions on the freedom to travel and associate cannot be read as support for the proposition that legally adjudicated PINS placed in training schools have a right to federal court review of the restrictions placed on them.

POINT III

PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHICH REQUIRES THE CONVENING OF A THREE-JUDGE COURT.

A.

Plaintiffs complain that they are being denied equal protection because the New York Family Court Act authorizes their placement in Division for Youth, Title III state training schools (§§ 754, 756) while abused or neglected children cannot be placed in these facilities (Fam. Ct. Act §§ 1052, 1055) (A. 53, ¶ 147). Under the standards previously set forth (ante at), it is clear that plaintiffs' argument is obviously without merit since there is a rational reason for providing different treatment to PINS and abused and neglected children. Moreover, this claim has been previously rejected by a Court in this Circuit. Martarella v. Kelley, supra, 349 F. Supp. 575.

The rationale for treating PINS differently from abused or neglected children is evident. Children who are adjudicated PINS are, by statutory definition, persons who are habitually truant or incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent or other lawful authority. § 712(b). New York case law has firmly established

that a lawful adjudication of a PINS cannot be based on a single act of misbehavior but rather, must rest on a pattern of behavior which fits into one of these categories. E.g. Matter of David W., 23 N Y 2d 589 (1971); Matter of David M., 34 A D 2d 1100 (4th Dept. 1970). An adjudication must be based on proof beyond a reasonable doubt. Matter of Richard S., 27 N Y 2d 802 (1970). Pursuant to §§ 754, 756 a PINS may be placed in a Division of Youth, Title III training school.

Article 10 of the Family Court Act (McKinney's Supp. 1974), entitled "Child Protective Proceedings", is designed to establish "procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being" (§ 1011). Under that article:

§ 1012(e)

> "'Abused child" means a child less than sixteen years of age whose parent or other person legally responsible for his care
>
> (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, a sex offense against such child, as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article."

The article defines a neglected child as one under the age of eighteen:

§ 1012(f)

"(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

(ii) who has been abandoned by his parents or other persons legally responsible for his care."

While it is true that neither PINS nor abused or neglected children have commited criminal acts, this fact alone does not mandate identical treatment if there is a rational basis for another course of action. Martarella, supra, 349 F. Supp. at 595. The reasonable basis for different treatment is apparent from the face of the statute.* The New York Legislature views these two categories of children in different ways, based on their factual differences. PINS are children who are charged and found beyond a reasonable doubt to be guilty of a defined pattern of misbehavior which is destructive to themselves and often to others. An abused or neglected child, on the other hand, is one who has been

* See also, e.g., Governor's Memorandum on Bills Approved, 1969 New York State Legislative Annual 549-50, discussing former Article 10 (L. 1969 ch. 264) which dealt with abused children.

mistreated, in a quite serious fashion, by his parent. It is the parent who is the "defendant", and the statute is designed not only to protect the child but also to deal with those who injure or mistreat their children. People v. Abrams, 73 Misc. 2d 534, 536 (County Ct. Nassau Co. 1973). Judge Lasker summarized the differences between the groups in Martarella, 349 F. Supp. at 595:

> "Neglected children are victims, PINS are (non-criminal) offenders, or at least socially maladjusted. The neglected child is sinned against rather than sinning. On the other hand, a PINS personal behavior is the cause of his subjection to legal authority."

New York's general policy of segregating abused or neglected children from PINS and JDS is reflected in areas other than the prohibition against their being placed in training schools. For example, the Family Court Act does not authorize the placement of abused or neglected children in any DFY facility or program. §§ 1052(a)(iii), 1055(a), (McKinney's Supp. 1974). Similarly, they may not be housed in temporary detention facilities with PINS and JDS.

18 NYCRR § 9.5. Child-caring facilities which are authorized to accept placement of PINS and JDS cannot accept abused or neglected children except under specified conditions, and then only with permission. 18 NYCRR § 5.18.

In Martarella v. Kelley, supra, a class of PINS temporarily detained in New York City detention facilities challenged their detention, inter alia, as violative of equal protection since they were housed with juvenile deliquents while neglected children were not. This Court emphatically rejected the challenge. Noting the statutory distinction between PINS and neglected children, the Court found a factual and rational basis for the difference in treatment, giving many of the reasons recited above. 349 F. Supp. at 594-97. While Martarella dealt with the temporary detention of PINS, its reasoning is precisely applicable to the instant case and forecloses plaintiffs' equal protection claim.

B.

Plaintiffs also urge that their equal protection claim should be judged by the "compelling state interest" test because they allege the deprivation of fundamental rights, the freedoms to travel and associate and liberty. As already discussed (ante at 41-44), plaintiffs have not presented a substantial federal question with regard to travel and association, and accordingly the alleged deprivation cannot be used as an underpinning for the application of the strict equal protection standard.

Plaintiffs also allege that the deprivation of liberty caused by their placement in training schools supports the use of the compelling state interest test. However, plaintiffs do not suffer deprivation of liberty because they are confined in training schools. Rather, they are deprived of liberty because of the valid state process of the Family Courts which adjudicated them PINS. The validity of that process is not challenged here. Plaintiffs' argument is thus nothing more than a bootstrapping effort. Under their theory, any PINS or prisoner or mental patient should always have his equal protection claims measured by the strict equal protection test solely because he is confined.

This theory has already been rejected by the federal courts. In Sero v. Oswald, 351 F. Supp. 522 (S.D.N.Y. 1972), affd., 506 F. 2d 1115 (2d Cir. 1974), cert. den., _____ U.S. _____, 95 S. Ct. 1587 (1975), a group of confined young adults challenged the validity of their reformatory sentences. The plaintiffs contended, inter alia, that they were being denied equal protection as compared to adults who committed the same crimes and received different sentences. This Court specifically rejected plaintiffs attempt to invoke the compelling state interest test merely because they were confined. 351 F. Supp. at 527 n. 6. The correctness of this ruling was borne out by the United States Supreme Court in McGinnis v. Royster, 410 U.S. 263 (1973). There the Court used the reasonable relation test in deciding the equal protection claim of inmates who were subjected, by statute, to longer prison terms than other inmates. Id. at 273, 276. See also cases cited in Sero, 351 F. Supp. at 527 n. 6.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED AND PLAINTIFFS' EQUAL PROTECTION CLAIM SHOULD BE DISMISSED.

Dated: New York, New York
October 3, 1975

Respectfully submitted,

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